Sekawan Guards Sdn Bhd v Thong Guan Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2-12-386-93
WAN ADNAN J
30 JULY 1994

Civil Procedure *— Pleadings — Facts not pleaded — Exemption clause — Negligence of others — Failure to plead in statement of defence — Whether can be raised at trial*

Contract *— Exemption clause — Security company not liable unless loss by theft caused solely by employees' negligence — Whether negligence of guard employed by premises' owner relevant — Whether clause can be relied on if not pleaded in defence — Burden of proving applicability of clause*

Evidence *— Burden of proof — Exemption clause in contract — Burden of proving applicability of clause*

Tort *— Negligence — Security guard — Theft from guarded premises — Guard provided by security services firm — Whether guard negligent — Whether negligence of another guard employed by owner of premises relevant — Claim also based on breach of contract — Limit of liability under contract*

By a contract in writing ('the contract'), the appellant ('Sekawan') agreed to provide security services at the premises of the respondent ('Thong Guan'). A theft occurred at the premises, resulting in the loss of Thong Guan's goods. Thong Guan sued Sekawan for breach of contract and, alternatively, negligence. Sekawan relied on an exemption clause in the contract which provided that it was not liable for any loss suffered by Thong Guan unless the loss was solely caused by the negligence of Sekawan's employee. Sekawan argued that the loss was in fact caused by the negligence of Thong Guan's own guard, who was not at the premises on the night in question although he was on duty. Sekawan, however, did not adduce any evidence to prove that Thong Guan's guard was negligent. The sessions court judge disregarded both the issues of the exemption clause and negligence of Thong Guan's guard on the ground that they were not pleaded in Sekawan's statement of defence, and allowed Thong Guan's claim. Sekawan appealed.

Held, dismissing the appeal:

(1) As the issues of the exemption clause and the negligence of Thong Guan's employee were not pleaded in Sekawan's statement of defence, the sessions court judge was correct in disregarding them. Neither could Sekawan now raise the issues on appeal.

(2) Thong Guan's claim was made under the contract and, therefore, the position of its employee could not in any way affect the contractual duty of Sekawan. The contract made no reference that there would be other guards on duty and hence, Thong

Guan had no obligation under the contract to provide other guards. A

(3) From the facts, the theft could not have been a quiet affair and the stolen items could only have been taken away in either two or three lorries over a period of 1½ hours if three persons were involved. There was also noise caused by the opening and closing of the metal sliding door. The guard was to remain awake all the time and could not have missed hearing the noise but failed to take the necessary action. B

Obiter:

Even if the exemption clause could be raised as a defence, the burden was on Sekawan to show that it applied. C

[Bahasa Malaysia summary

Melalui suatu kontrak bertulis ('kontrak tersebut'), perayu ('Sekawan') bersetuju untuk memberikan perkhidmatan keselamatan di premis responden ('Thong Guan'). Suatu kecurian telah berlaku pada premis tersebut, menyebabkan kehilangan barangan Thong Guan. Thong Guan telah mendakwa Sekawan atas kemungkiran kontrak dan, secara alternatif, kecuaian. Sekawan bergantung pada suatu fasal pengecualian di dalam kontrak tersebut yang memperuntukkan bahawa ia tidak akan bertanggungjawab ke atas apa-apa kerugian yang dialami oleh Thong Guan melainkan jika kerugian itu diakibatkan oleh kecuaian pekerja Sekawan. Sekawan menegaskan bahawa kerugian itu pada hakikatnya telah disebabkan oleh kecuaian pengawal Thong Guan sendiri, yang tidak berada di premis tersebut pada malam yang berkenaan sungguhpun dia bertugas. Walau bagaimanapun, Sekawan tidak mengemukakan sebarang keterangan untuk membuktikan bahawa pegawal Thong Guan adalah cuai. Hakim mahkamah sesyen telah mengabaikan kedua-dua isu mengenai fasal pengecualian dan kecuaian pekerja Thong Guan atas alasan bahawa isu tersebut tidak dijadikan pli di dalam pernyataan pembelaan Sekawan, lalu membenarkan tuntutan Thong Guan. Sekawan telah membuat rayuan. D E F G

Diputuskan, menolak rayuan itu

(1) Oleh kerana isu mengenai fasal pengecualian dan kecuaian pekerja penentang tidak dikemukakan di dalam pernyataan pembelaan perayu, hakim mahkamah sesyen adalah betul dalam mengabaikan isu tersebut. Sekawan juga tidak boleh membangkitkan isu tersebut pada peringkat rayuan. H

(2) Tuntutan Thong Guan dibuat di bawah kontrak itu dan, dengan itu, soal pekerjanya tidak dengan apa cara juapun mempengaruhi tanggungjawab Sekawan di bawah kontrak tersebut. Kontrak tersebut tidak membuat rujukan bahawa terdapat pengawal lain yang bertugas dan dengan itu, Thong Guan tidak mempunyai I

A obligasi di bawah kontrak untuk membekalkan pengawal-pengawal lain.

(3) Dari fakta kes ini, kecurian itu tidak mungkin suatu kejadian yang senyap dan barangan yang dicuri itu hanya boleh diangkut di dalam dua atau tiga buah lori dalam tempoh 1½ jam jika tiga
B orang yang terlibat. Juga terdapat bunyi akibat pintu logam gelangsar dibuka dan ditutup. Pengawal itu dikehendaki berjaga pada setiap masa dan tidak mungkin tidak mendengar bunyi itu tetapi gagal mengambil langkah yang perlu diambil.

Obiter:

C Sekalipun fasal pengecualian itu boleh dibangkitkan sebagai suatu pembelaan, beban untuk menunjukkan bahawa ia terpakai terletak pada Sekawan.]

[*Editorial Note*: The appellants have appealed to the Supreme Court
D vide Civil Appeal No 04–35–94.]

Notes

For a case on facts not pleaded, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2583.

E For cases on exemption clauses, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1549–1559.

For a case on the person who alleges a fact must prove it, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 325.

Cases referred to

F *Gimstern Corp (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 (folld)

Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp [1986] 2 MLJ 124 (refd)

G *M Mohan Ghandi* (*Mohan Ghandi & Associates*) for the appellant.

Romesh Abraham (*Michele K Lim* with him) (*Shook Lin & Bok*) for the respondent.

Wan Adnan J: This is an appeal against the decision of the learned sessions court judge, Kuala Lumpur allowing the plaintiff's (respondent's)
H claim against the defendant (appellant) for the sum of RM100,000 together with interest and costs.

By a contract in writing between the plaintiff and the defendant dated 15 January 1984, the defendant agreed to provide security services at the plaintiff's premises No 32D–1 Jalan Chan Sow Lin, Kuala Lumpur
I ('the said premises'), in consideration of the plaintiff paying the defendant a sum of RM1,076 per month.

On 25 December 1984, a theft/burglary occurred at the said premises resulting in the loss of the plaintiff's goods as follows:

(i)	42 boxes of Kent Deluxe 20's cigarettes @ RM1,059.10/box	RM44,482.20
(ii)	6 boxes of Kent King Size 20's cigarettes @ RM970.80/box	RM5,824.80
(iii)	2 boxes of Pall Mall 20's cigarettes @ RM1,014.90/box	RM2,029.80
(iv)	5 boxes of Benson & Hedges 14's cigarettes @ RM1,059/box	RM5,295.35
(v)	114 boxes of Benson & Hedges 20's cigarettes @ RM882.50/box	RM100,000.00
		RM158,237.15

The plaintiff alleged that the loss was caused by the breach of the contract on the part of the defendant and/or the breach of the defendant's duty as bailee to the plaintiff; alternatively, the loss was caused by the negligence of the defendant, their servants or agents. The defendant's liability under the contract is limited to the sum of RM100,000.

According to the plaintiff, the defendant was to provide a security guard who was to be locked inside the said premises. The guard had access to the ground floor and also to the first floor. Access from the ground floor to the first floor was by way of a staircase through the office on the ground floor. The arrangement was that the said guard was to patrol the ground floor and the first floor and to look into the store through the surveillance hole on the wall of the first floor toilet. The guard had access to the telephones which were located in the office on the ground floor. A set of keys to the main entrance was kept inside a glass case at the staircase. In an emergency, the guard could break the glass to get the keys.

The defendant, however, said that under the arrangement, the guard was to be locked on the ground floor. The guard had no access to the staircase and therefore he had no access to the first floor of the said premises.

On this point, the learned sessions court judge found as a fact as follows:

> Tempat letaknya pegawai keselamatan di dalam premis adalah seperti telah diatur dan dipersetujui oleh plaintif dan defendan, dan jika pengawal mendapati apa-apa ia boleh ambil kunci untuk keluar bagi mengambil tindakan yang sesuai dan sewajarnya.

In other words, she found as a fact that the guard had access to the staircase, and therefore also had access to the first floor of the said premises. She found the guard negligent.

It was the contention of the learned counsel for the defendant that the defendant was not negligent. The guard was on the ground floor. He did not hear anything. The defendant had discharged their obligation in accordance with the contract.

A As I said earlier, the learned sessions court judge had found as a fact that the guard had access to the staircase and to the first floor of the said premises. I find there is evidence to support her finding.

The layout plan of the ground floor and the first floor of the said premises is on pp 30 and 31 of the record of appeal. The plan shows B clearly the staircase connecting the ground floor and the first floor. It also shows the surveillance hole through which the store (where the goods were taken from) could be viewed from the first floor.

The theft could not have been a quiet affair. The guard was to remain awake all the time. According to the adjuster's report which was admitted as evidence, the 169 cartons of cigarettes could only have been C taken away in either three small lorries, or one small lorry and one large lorry. The time needed for loading was 1½ hours if three persons were involved. There was also noise caused by the opening and closing of the metal sliding door. The guard could not have missed hearing the noise. He ought to have notice the theft through the surveillance hole and ought to D have taken action either by using the phones on the ground floor or taking the keys to the main exit to take any necessary action. None was done.

The learned sessions court judge again found as a fact when she said:

> Jika pengawal berkenaan betul menjalankan tugasnya seperti dijanjikan/ dijadualkan, ia tentu akan sedar/dapat mengesan pencurian berkenaan.

E Again I will say there is evidence to support her finding.

The other contention of the defendant is that the defendant cannot be made liable unless the loss was caused solely by the negligence of the company's own employees. This is because of cl 7 of the contract which provides as follows:

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> The company shall not be liable for any loss suffered by the owner due to burglary, theft, fire or any other cause whatsoever, unless such loss is solely caused by the negligence of the company's own employee acting in the course of their employment.

G According to the learned counsel, the plaintiff had directly employed a guard to look after the main entrance. He was one Gopal Singh. There was another 'neighbouring guard' to keep an eye on the rear of the store. It must be shown that the two guards were not negligent. Gopal Singh was not called as a witness. From the evidence of the plaintiff's witness himself, Gopal Singh was not at the place he ought to be on the night in question.

H The defendant did not plead cl 7 in the defence. The issue of negligence of the plaintiff's own guard was not pleaded. The defendant therefore cannot now raise this on appeal. In the case of *Gimstern Corp (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302, his Lordship Wan Hamzah SCJ said:

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> The issues brought up at the trial had not been pleaded in the statement of defence, and this was a contravention of O 18 r 8 of the Rules of the High Court and therefore the contentions should not have been entertained (*A-G v Lord Mayor etc of City of Sheffield* (1912) 106 LT 367).

The learned sessions court judge was correct in disregarding the issue. A

Even if cl 7 can be raised, the burden is on the defendant to show that the clause applies, as cl 7 is an exclusion clause: see *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp* [1986] 2 MLJ 124.

The defendant must prove that there was negligence on the part of B other people. It was for the defendant to call Gopal Singh and the other guard. It was not for the plaintiff to call them. In any event, the position of Gopal Singh could not in any way affect the contractual duty of the defendant under the contract. The contract makes no reference that there be other guards on duty. There was no obligation under the contract that C the plaintiff was to provide other guards. The plaintiff's claim is under the contract.

I do not find any merit in the other grounds of appeal.

For the above reasons, I dismissed the appeal with costs.

Appeal dismissed. D

Reported by Isabel Liong

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